IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 17 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

PACKART PVT LTD - Respondent(s)

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Appearance :
MR T.U.BHATT for Applicant

NOTICE SERVED for Respondent
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 18/08/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. Income Tax Appellate Tribunal, Ahmedabad Bench “C” has referred the following two questions under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

> “(1) Whether, the Appellate Tribunal was right in law and on facts in confirming deletion of addition of Rs.40 lacs?
>
> (2) Whether, the Appellate Tribunal is right in law and on facts in cancelling the interest charged under Section 215 of the Income tax Act, 1961?”

2. The assessment year is 1978-79 and the relevant accounting period is the year ended on 30th June 1997. The assessee, a Private Limited Company, purchased business undertaking with effect from 1/7/1973 from its holding company M/s KPPL. The purchase consideration of the undertaking was constituted of a component being goodwill valued at Rs.10 lacs. By an agreement dated 31st March 1977, the assessee company transferred its business undertaking with effect from 1st April 1977 to its wholly owned subsidiary company M/s Offisade Pvt.

Ltd. It transpires that M/s Offisade Pvt. Ltd., subsequently transferred the business undertaking with effect from 1/7/1977 to M/s Ambalal Sarabhai Enterprise Pvt. Ltd., which ultimately got converted into a Public Limited Company. The assessee had charged consideration to M/s Offisade Pvt. Ltd. by including a sum of Rs.50 lacs on account of goodwill.

3. According to the assessing officer, the entire transaction was primarily an adventure in the nature of trade. The reasons which weighed in coming to this conclusion were, (1) M/s Offisade Pvt. Ltd. was a wholly owned subsidiary company and was newly floated by the assessee; (2) the period for which the business undertaking was held by the assessee was short. He worked out the business profits at a sum of Rs.40 lacs, as according to him, the book value of goodwill was Rs.10 lacs. He, therefore, treated the sum of Rs.40 lacs as profits arising from adventure in nature of trade assessable under the head “profits & gains of business”. Alternatively, he considered the excess amount of Rs.40 lacs as profits chargeable under Sections 41(1) and 41(2) of the Act.

4. The assessee carried the matter in appeal before the

Commissioner (Appeals), who deleted the addition of Rs.40 lacs, holding that the business undertaking had been run by the assessee company for a period of three years and nine months before transferring the same to its wholly owned subsidiary, and further that, this was a solitary transaction. Insofar as the alternative charge regarding applicability of Sections 41(1) and 41(2) of the Act was concerned, the Commissioner (Appeals) held that the instant case was a case of slump sale of whole undertaking and hence, the said provisions were not applicable.

5. Revenue carried the matter in appeal before the Tribunal. The Tribunal, however, dismissed the departmental appeal vide its order dated 8th August 1990.

6. Mr.T.U.Bhatt, the learned standing counsel appearing on behalf of the applicant revenue invited attention to the observations made by the assessing officer, with special reference to the profits earned by the assessee in the four years after taking over the business undertaking, to submit that, considering the volume of profits, the transaction was an adventure in nature of trade and not a transaction on capital account. He,

therefore, urged that both the Commissioner (Appeals) and the Tribunal had erred in treating the transaction to be on capital account.

7. Though served, there is no appearance on behalf of the respondent assessee.

8. The Tribunal has recorded following findings of fact in the impugned order :

> "In the instant case, it is an obvious fact that the business undertaking in question had been purchased by the assessee company on 1-4-73 and the purchase consideration then included a sum of Rs.10 lacs on account of goodwill. Then, after the purchase, the assessee company had run the business of the undertaking for three years and nine months. During that period, the assessee company had earned losses only in the first year but good profits during the rest of the period, as is evident from the accounts from four years placed on record. Therefore, by the mere fact that the undertaking had been purchased for a consideration inclusive of Rs.10 lacs only for goodwill but the same was transferred for a consideration comprising a sum of

> Rs.40 lacs for goodwill and the transferee company again transferred the undertaking to ASEPL which ultimately got converted into a public limited company, it cannot be conclusively held that it was a case of an adventure in the nature of trade, in so far as the transfer of the undertaking by the assessee company w.e.f. 1-4-77 was concerned. In our opinion, the CIT (A) has given good and satisfactory reasons for deleting the addition of rs.40 lacs and we fully agree with him in that respect. Therefore, we dismiss this ground."

9. However, before recording these findings of fact, the Tribunal has summarized the legal position on an analysis of the cases cited before it. It is stated that the substance of the transaction is required to be examined and where the assessee claims that the incidence of a particular transaction are exempt, the onus is on the assessee. Similarly, where the transaction is in relation to a transfer of capital assets, burden to show that the same is on revenue account and an adventure in the nature of trade, is on the revenue. That no single factor by itself is sufficient to conclusively establish that a particular transaction was an adventure in nature of trade.

Merely because the transaction results in some profits in the hands of the transferor, or that the transferor had a motive to earn profits at the time of acquisition of the property, it cannot be conclusively stated that the resultant gain was necessarily business profits and not capital appreciation. Finally, the Tribunal has noted that each case is required to be decided on its own merits in light of the facts and circumstances attendant to the transaction.

10. Taking into consideration the findings of fact recorded by the Tribunal as well as settled legal position, it is not possible to find any infirmity in the impugned order of the Tribunal. The revenue has not been able to show, in any manner whatsoever, that the concurrent findings of fact recorded by the Commissioner (Appeals) and the Tribunal are incorrect. Once the facts show that the business undertaking was held for nearly four years, and that the assessee had during that period run the undertaking, it is not possible to accept the stand of the revenue that the transaction was merely to facilitate transfer of the undertaking in favour of ASE Ltd., who ultimately came to acquire the undertaking. Referring to the basis of assessing officer's order, the Tribunal has noted that

though the assessee undertaking had generated losses in the first year after acquisition of the undertaking, from the accounts placed on record, in the subsequent three years, the assessee company had earned good profits.

11. In light of the aforesaid findings of fact, it is apparent that the Tribunal was right in law and on facts in confirming the deletion of addition of Rs.40 lacs made by the assessing officer and upholding the decision of Commissioner (Appeals). Accordingly, question No.1 is answered in the affirmative i.e. in favour of the assessee and against the revenue.

12. The assessing officer had also levied interest under Section 215 of the Act. Both the Commissioner (Appeals) and the Tribunal have held that the assessee could not have been expected to pay advance tax voluntarily in respect of the amount of Rs.40 lacs, which was added by the assessing officer.

13. As can be seen from the order of the Tribunal and the Commissioner (Appeals), they have concurrently found that the amount of Rs.40 lacs added by the assessing officer could not have been envisaged and the assessee

could not be expected to pay advance tax on the said sum of its own volition considering the fact that the assessee had treated the said sum as being on capital account. Both the Tribunal and Commissioner (Appeals) have also deleted the interest charged under Section 215 of the Act also on the ground that once the addition in question does not survive, interest charged under Section 215 of the Act, cannot be upheld.

14.There is no reason to take any other view of the matter in light of the aforestated factual position. Accordingly, question No.2 is answered in the affirmative i.e. in favour of the assessee and against the revenue, by holding that the Tribunal was justified in law and on facts in deleting the interest charged under Section 215 of the Act.

15.The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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